1975
Dec. 24

PAVLOS GEORGHIOU ZARPETEAS

v.

DEMETRIOS IOANNOU TOULOUPOU AND OTHERS

[HADJIANASTASSIOU, A. LOIZOU, MALACHTOS, JJ.]

PAVLOS GEORGHIOU ZARPETEAS,

Appellant-Defendant,

v.

DEMETRIOS IOANNOU TOULOUPOU AND OTHERS,

Respondents-Plaintiffs.

(Civil Appeal No. 5335).

Negligence—Road accident—Apportionment of liability by trial Court—Principles on which Court of Appeal intervenes—Collision between motor vehicles moving in opposite directions—Defendant driving on his wrong side of the road whilst overtaking stationary vehicle that blocked his side of the road—Trial Court correctly found that his negligence the main cause of the accident—Apportionment of liability as found by trial Court sustained —Section 57(1) of the Civil Wrongs Law, Cap. 148.

Civil Procedure—Practice—Counterclaim—Four actions by different plaintiffs against the same defendant arising out of the same transaction—Counterclaim by defendant in one action raising questions between himself and the plaintiff in such action and the other plaintiffs—Actions consolidated—No objection taken by plaintiff, in the said action against the counterclaim at any stage of the proceedings in the Court below—Whether judgment in the counterclaim validly given.

These proceedings arose out of a traffic accident whereby a motor car driven by the respondent (plaintiff in Action No. 210/72) collided with a car driven by the appellant (defendant). As a result of the accident the said plaintiff, as well as his four passengers, were injured and brought separate actions against the defendant claiming damages.

The trial Court held that the defendant was 80% to blame for the collision and the plaintiff 20%. The defendant appealed against such apportionment on the ground that the finding of the trial Court that he was to blame for the collision 80% or at all, was wrong

in law as being contrary to his evidence which remained uncontradicted.

The said plaintiff cross-appealed on the ground that the finding of the trial Court that he was guilty of contributory negligence to the extent of 20% was wrong in law, because it was not supported by the evidence as a whole. The plaintiff further complained that the trial Court erred in allowing the appellant's-defendant's counterclaim with regard to Action Nos. 409/72, 411/72 and 412/72, on the ground that such procedure was wrongly allowed to substitute the proper third party procedure specifically provided in cases of that nature by the Civil Procedure Rules.

The collision occurred whilst the two vehicles were proceeding in opposite directions and whilst the defendant was in the process of overtaking a stationary lorry that blocked his side of the road. The trial Court after hearing the evidence of both sides found two faults of blame for the collision regarding the plaintiff and four faults regarding the defendant. As to the plaintiff the Court found (a) that he failed to foresee that a negligent driver might drive in his wrong side of the road in overtaking the stationary lorry and (b) that he neither sounded his horn nor took any other precautions before he noticed the defendant's car. And as to the defendant the Court found that (a) though his side of the road was blocked he attempted to overtake the stationary lorry and drove on to his wrong side of the road thus blocking the pathway of the plaintiff; (b) he failed to sound his horn or take any precautions and that he did not anticipate that an oncoming car might be on the way on its proper side of the road; (c) he had no proper or any lookout and he failed to see the other car before they were more than 15 ft. from each other; and (d) he did not take any avoiding action in the form of either application of brakes or swerving to his left.

With regard to the part of the cross-appeal concerning the counterclaim the factual position was as follows: The plaintiff claimed damages against the defendant for personal injuries, when he was involved in a road traffic accident with a car driven by the defendant. The defendant in his defence denied that he was in any way

negligent and after blaming the plaintiff for the said accident, he set up a counterclaim claiming relief against the plaintiff. Although the defendant by his defence had set up a counterclaim which raised questions between himself and the plaintiff along with other persons in three other actions, the plaintiff has failed to raise by his pleading any matters which would show that the counterclaim was not maintainable. And when on the 12th May, 1973 all four actions were consolidated by order of the Court, apparently because all four of them involved a common question of law and fact, again nothing was said by the plaintiff and the four actions proceeded at the trial as a single action. Both at the trial and in this appeal it has not been challenged by the plaintiff that the counterclaim was related with the plaintiff's claim and that it arose out of the same traffic accident.

Held, (1) with regard to the appeal and cross-appeal concerning the apportionment of blame:

1. In the light of the findings of the trial Court we have come to the conclusion, after considering the whole evidence, that it was reasonably open to the trial Court to reach the findings of fact it did and its conclusion as to blame based also on the credibility of the witnesses, and we see no reason for interfering with those findings of fact. (See the *Miraflores* v. *Livanos* [1967] 1 A.C. 826).

2. Such being the faults on each side, as found by the trial Court, we would agree that the preponderance of blame lies on the defendant and there remains the question whether we could or should interfere with the apportionment of the trial judge.

3. We, thus, approach the question of apportionment on the basis that both parties were at fault. It has been said judicially in a number of cases that the trial judge, who has the benefit of hearing the evidence first hand, enjoys an enormous advantage over any appellate tribunal. And where an appellate tribunal accepts the findings of fact of the Court below and its conclusion (as to blame) it should, in the absence of error in law, only revise the distribution of blame in very exceptional circumstances. (See *British Fame (Owners)*

v. *MacGregor (Owners)* [1943] A.C. 197 and *Koningin Juliana*, reported in the Times of May 10, 1975).

4. The overriding consideration was that the defendant attempted to overtake the stationary lorry which was blocking his way without in any way making his presence known to anyone who was lawfully using the road. It was this fact, above all else, that gave rise to the position of difficulty and danger which the plaintiff tried to meet and which resulted in the accident complained of by the plaintiff.

5. There is, therefore, no room for this Court to interfere with the apportionment made by the trial Court, having detected no error of law in the course of its full and careful judgment. We would dismiss the appeal and cross-appeal on the issue of apportionment of liability.

Held, (II) with regard to the cross-appeal concerning the counterclaim :

1. We find ourselves unable to agree that the trial Court was wrong. Once the issues of fact raised by the claims in the four actions and the counterclaim were tried together, after the consolidation, and both parties succeeded, the Court was bound to give two judgments, one for the plaintiff on his claim and the other for the defendant on his counterclaim; this was so because in spite of the fact that a counterclaim is substantially a cross-action and not merely a defence to the plaintiff's claim, yet the defendant was entitled to set up a counterclaim, once such counterclaim related and arose out of the same transaction.

2. In the case in hand there were four actions pending against the defendant and he had a valid cause of action against the plaintiff. He was certainly entitled to bring a counterclaim once he could have brought an action on the question of negligence, which was conveniently tried by the Court; and because every cross-claim of whatever kind can now be pleaded as a counterclaim. (*Pilavachi and Co. Ltd.* v. *International Chemical Co. Ltd.* (1965) 1 C.L.R. 97 distinguishable on its facts).

Appeal and cross-appeal dismissed.

Cases referred to :

Miraflores v. *Livanos* [1967] 1 A.C. 826;

British Fame (Owners) v. *MacGregor (Owners)* [1943] A.C. 197;

Koningin Juliana, The Times May 10, 1975;

Pilavachi and Co. Ltd. v. *International Chemical Co. Ltd.* (1965) 1 C.L.R. 97;

Beddall v. *Maitland*, 17 Ch. D. 174.

Appeal and cross-appeal.

Appeal by defendant and cross-appeal by plaintiff against the judgment of the District Court of Paphos (Stylianides, Ag. P.D.C. and Hji Constantinou, S.D.J.) dated the 30th May, 1974, (Consolidated Action Nos. 409/72 - 412/72) whereby the apportionment of liability in a road accident was assessed at 80% against the defendant and 20% against the plaintiff.

E. Komodromos, for the appellant.

N. Mavronicolas with *P. Sivitanides*, for the respondents.

Cur. adv. vult.

The facts sufficiently appear in the judgment delivered by :-

HADJIANASTASSIOU, J. : On January 7, 1972 the plaintiff in action No. 410/72, Andreas Ioannou of Beya, was injured in a traffic accident whilst he was driving his motor car under Registration No. EB080 on his way from Paphos to Emba village and carrying four passengers. At a point just outside Emba village he collided with a van under Registration BY889 driven by the defendant and coming from the opposite direction on his way to Paphos. As a result of that accident the plaintiff, as well as his four passengers, sustained injuries and brought actions for negligent driving against the defendant claiming damages.

On May 30, 1974, the Full District Court of Paphos held the defendant 80% to blame for the collision and the plaintiff 20%. Then the Court awarded to the plain-

tiff an amount of £3,250 general damages and £1,034 special damages. The defendant in Action No. 410/72 appealed against this apportionment made by the trial Court, and the notice of appeal raised one point only, *viz.*, that the finding of the trial Court that the defendant was to blame for the collision 80% or at all, was wrong in law as being contrary to the evidence of the appellant which remained uncontradicted.

The plaintiff cross-appealed claiming (a) that the finding of the trial Court that he was guilty of contributory negligence, and that his blame was apportioned to 20% was wrong in law and because it was not supported by the evidence as a whole. Furthermore, the plaintiff claimed that the findings of the Court that he did not sound his horn before the collision and that he failed to foresee that a negligent driver might drive in the opposite direction on his side of the road, was wrong in law and contrary to the evidence adduced. Then the plaintiff introduced a novel point, that is to say, that the Court erred in allowing the defendant's counter-claim with regard to Actions Nos. 409/72, 411/72 and 412/72, on the ground that such procedure was wrongly allowed to substitute the proper third party procedure specifically provided in cases of that nature by civil procedure rules.

It was the version of the plaintiff that on the date of the collision he was driving his motor car at a speed of about 30 m.p.h. When he approached a stationary lorry from a distance of 7 - 10 meters, and because he had no visibility, he sounded his horn twice. Although he never anticipated that an oncoming car might be driven on its wrong side of the road, nevertheless, he kept a proper look out and he noticed when he was parallel with the front part of the lorry an oncoming vehicle from a distance of 10 meters, keeping its wrong side of the road, at a high speed and blocking his own side of the road. As it was driven towards him, he immediately applied his brakes and swerved to the left into the fields in order to avoid the collision, but the driver of the other motor car collided with him because he did not reduce his speed. The plaintiff in being questioned, explained that had he anticipated that a motor car would have been coming from the opposite direction on its wrong side of the road, he would have gone further on

to the berm and he would also reduce his speed as a precautionary measure. He further added that had he done so he would have been in a position to take more avoiding action in spite of the fact that the accident would have occurred, though the result might have been less serious.

Regarding the sounding of the horn, there was further corroborative evidence by three witnesses (the passengers in the motor car of the plaintiff) but the Court who had seen and heard the witnesses, rejected their version, and we see no reason to interfere, because the trial Court had given its reasons.

It was the version of the defendant that he was driving at a speed of 25 - 30 m.p.h. on his way to Paphos, and when he reduced his speed and was about 30 meters from the stationary lorry, he took the centre of the road in order to overtake the lorry and to see if there was an oncoming car. He admitted that he neither sounded his horn nor heard the horn of the other car, adding that he would have heard had the driver sounded it. He further said that he noticed the plaintiff's car for the first time when he was at a distance of 10 - 15 ft. driving at 40 m.p.h. and the collision took place, but at the time of the impact his own car was within 3 ft. from the right edge of the asphalt. In order to alleviate himself from his negligent driving, he said that he thought the plaintiff would have gone on to the berm because there was sufficient room to pass one another, but he admitted that he took no avoiding action whatsoever. There is no doubt that the accident occurred on the right side (wrong side of the road of the defendant) and as the witness explained, the reason was in order to overtake the stationary lorry.

The accident took place at 1.15 p.m. and the police arrived at the scene at a commendable speed and prepared a plan which shows that the asphalted part of the road is 10 ft. wide with usable berms 2 ft. 10 ins. wide on the right in the direction of Emba village, and 4 ft. wide on the left in the same direction. It appears further that the visibility from the stationary lorry was tested and found to be 200 - 300 ft. towards Emba and there was a greater visibility towards Paphos, and that the

unattended stationary lorry was covering 4 ft. of the asphalted part of the road, and no doubt had obstructed the visibility of the road users when they were at a distance of 50 - 70 ft. from either direction. It appears further that the brake marks found were caused by the plaintiff's car and were 25 ft. long starting from the edge of the asphalt and ending at the edge, although in between they run 6 ins. - 1 ft. 3 ins. inside the berm. The dimensions of both cars were also measured and it appears that that of the plaintiff was 12 ft. 10 ins. long and 4 ft. 10 ins. wide; and that of the defendant 13 ft. long and 5 ft. 8 ins. wide. It appears further that the total width of the unoccupied asphalt by the stationary lorry and adding the width of the left berm to the direction of Emba was 10 ft. With this in mind, the trial Court came to the conclusion that having regard to the aggregate width of the two moving vehicles, which was 10 ft. 6 ins. that it was impossible for the two vehicles to have been accommodated in the aforesaid unoccupied part of the road, as the defendant claimed in his evidence.

According to the plan, the point of the collision marked "X" was on the left edge of the asphalt, because the expert witness found fragments of broken glass on that spot. The trial Court, in criticizing that conclusion of the expert witness, said that "this is only, to say the least, a half truth". The two vehicles came to a head on collision, and almost the whole front of the one collided with the corresponding part of the other car, (see evidence of both drivers and the photographs). The Court went on to say that the same police constable stated that the brake marks were caused by the right wheel of motor car EP080, whilst in the criminal trial which was held in April, 1972, his evidence was that the brake marks were caused by the left wheel. The Court, having not accepted that the brake marks were caused by the right wheel, gave three reasons: (i) That in the criminal trial the memory of the witness was not failing him because the events were more recent (ii) that having regard to the line of the brake marks, the left wheel at least at some length should have mounted the dry wall which is not borne out by the evidence; and (iii) that had it been so, no impact would have occurred. The trial Court then came to the conclusion that the

brake marks were caused by the near-side wheel and found that the plaintiff's vehicle at the time of the impact was on the left moiety of the asphalt and the defendant's vehicle was almost exclusively occupying the left part of the asphalt. Furthermore, the Court having heard and observed the demeanour of the witnesses and having tested their evidence with the real evidence before them, including the photographs, came to the conclusion that the photographs were more truthful than the defendant, and said that the defendant did not impress them at all, because he moulded his evidence in order to minimize his share of the blame. The defendant was almost in the process of overtaking the stationary lorry which left only 6 ft. of unoccupied asphalt. Then the Court made it quite clear that they did not accept that at the time of the collision the car of the defendant was 3 ft. from his right edge of the asphalt, leaving thereby 7 ft. (including the berm) for the plaintiff. Finally, the Court, for the reasons given, reached (as they put it) the inescapable conclusion that the defendant was not keeping a proper lookout. On the contrary, the Court having considered the evidence of the plaintiff, said that the plaintiff, on noticing the defendant's car being driven towards him, in the agony of the moment, applied his brakes and deviated from his course on the asphalt, but did not manage in the circumstances to take more to his left.

In the light of these findings, we have come to the conclusion, after considering the whole of the evidence, that it was reasonably open to the trial Court to reach the findings of fact and its conclusion as to blame based on the credibility also of the witnesses and we see no reason for interfering with those findings of fact. (See the *Miraflores* v. *Livanos* [1967] 1 A.C. 826). Thus it appears to us that such being the faults on each side, as found by the trial Court, we think we would agree that the preponderance of blame lies on the defendant, and there remains the question whether we could or should interfere with the apportionment of the trial judge. We approach the question of apportionment, therefore, on the basis that both parties were at fault. It has been said judicially in a number of cases that apportionment of fault is not an easy task for any judge,

but it must be said that the trial judge, who has the benefit of hearing the evidence first hand, enjoys an enormous advantage over any appellate tribunal. It has been established by a long series of decisions, culminating in that of the House of Lords in the *MacGregor*, [1943] A.C. 197, and also in a number of cases of our own Supreme Court. In the *MacGregor* case it was held that "Where an appellate tribunal accepts the findings of fact of the Court below and its conclusion (as to blame) it should, in the absence of error in law, only revise the distribution of blame in very exceptional cases, as where, for instance, a number of different reasons have been given why one ship is to blame, but the Appellate Court, on examination, finds some of those reasons not to be valid, or where the judge in distributing blame is shown to have misapprehended a vital fact bearing on the matter."

In the *Koningin Juliana*, reported in the Times of May 10, 1975, it appears that the learned trial judge, in a case of collision between two ships, reported in [1973] 2 Lloyd's Rep. 308, held the Koningin Juliana one-third to blame for the collision and the other ship two-thirds. The case went on to the Court of Appeal, [1974] 2 Lloyd's Rep. 353, and the majority of the Court held that the blame should be apportioned equally. The House of Lords restored the apportionment made by the learned trial judge affirming at the same time that the House of Lord's decision in the *MacGregor* case was still of full force. Lord Wilberforce in his judgment, after referring shortly to the facts, said that both vessels were undoubtedly guilty of fault of navigation causative of the damage which had occurred, and the question for the Courts was how that damage should be apportioned in accordance with the Maritime Conventions Act, (1911) s. 1.

> "In his Lordship's view the case was one where, the trial judge having made an apportionment, taking all factors into account, a Court of Appeal, including their Lordships' House, ought not to disturb it. The modern authority which reflected that principle was the decision of the House in *The MacGregor* where the reasons for the rule were clearly and authori-

tatively stated. They were as valid and generally applicable today.

Of subsequent cases relied on as to some degree diminishing the force of *The MacGregor* were *The Aimizar* ([1971] 2 Lloyd's Rep. 290) and *The British Aviator* ([1965] 1 Lloyd's Rep. 271). In the former, variation of the apportionment in the circumstances of the case was clearly authorized by *The MacGregor*, and his Lordship doubted the validity of the latter. He noted that in that case Lord Justice Willmer, whose authority lent its weight, himself clearly thought it to be on the borderline. His Lordship deprecated the use of the case as a basic for weakening of the *MacGregor* rule.

Sir Gordon's judgment was clear, correct and unaswerable, and his Lordship would be content to accept the whole of it. The majority of the Court of Appeal had been unable to establish the necessary foundation for departing from the judge's apportionment."

On the facts of the present case, it appears that the trial Court found these faults of blame for the collision regarding the plaintiff and the defendant. As to the plaintiff, the Court found two faults: (a) That he failed to foresee that a negligent driver might drive in the opposite direction on his side in overtaking the 7 UP lorry; and (b) that he neither sounded the horn nor took any other precautions before he noticed the defendant's car. As to the defendant, the Court found four faults: (i) That though his side of the road was blocked he attempted to overtake the stationary lorry and drove on to his wrong side of the road thus blocking the pathway of the plaintiff; (ii) he failed to sound his horn or take any precautions and that he did not anticipate that an oncoming car might be on the way on its proper side of the road; (iii) he had no proper or any lookout and he failed to see the other car before they were more than 15 ft. from each other; (iv) he did not take any avoiding action in the form of either application of brakes or swerving to his left. So, in the result, the Court found two faults for the plaintiff and four for the defendant, and found the plaintiff and the defendant to blame in the proportion of 20% and 80% respectively.

According to s. 57(1) of our Civil Wrongs Law, Cap. 148, in a case where the fault of both parties has been established, the damages recoverable in respect thereof shall be reduced to such an extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. The degree of fault is to be measured, therefore, by assessing both their blameworthiness and their causative effect, and in our view quite properly the Court addressed its mind on this legal proposition and found that the negligence of the defendant was the main cause of the accident.

In our judgment, the overriding consideration was that the defendant attempted to overtake the stationary lorry which was blocking his way without in any way making his presence known to anyone who was using lawfully the road, with the result that the accident took place on the extreme side of the plaintiff. It was this fact, above all else, that gave rise to the position of difficulty and danger which the plaintiff tried to meet and which resulted in the accident complained of by the plaintiff. The very persuasive argument which we have heard regarding the apportionment of blame both by counsel on behalf of the appellant and of the respondent, entirely fails, in our view, to convince us that there is room for this Court to interfere with the apportionment made by the Court, having detected no error in law in the course of its full and careful judgment. As we said earlier, on the facts of this case, we think it is only right that we, for our part, wholly agree with the conclusion of the trial Court, and had we been trying the case at first instance, we feel fairly confident that we should, in all probability have arrived at the same result. As we are of the view that the trial Court, in arriving at their apportionment of fault came to a proper conclusion, we would dismiss the appeal and cross-appeal on the issue as to the apportionment of blame.

We now turn to the second point raised in the cross-appeal and the question is whether the defendant in Action No. 410/72 could set up by way of counter-claim against the claims of the plaintiff any right of claim, whether such counter-claim, sound in damages or not, and such counter-claim shall have the same effect as a cross-action so as to enable the Court to pronounce

a final judgment in the same action both on the original and on the cross-claim.

We think that before answering this question, we would recall that the plaintiff, the driver of motor car under Registration No. EB080, claimed damages against the defendant for personal injuries when he was involved in a road traffic accident with a car driven by the defendant. The defendant in his defence denied that he was in any way negligent and after blaming the plaintiff for the said accident, he set up a counter-claim claiming relief against the plaintiff. But the plaintiff, although the defendant by his defence had set up a counter-claim which raised questions between himself and the plaintiff along with other persons in Actions 409/72, 411/72, and 412/72, has failed to raise by his pleading any matters which would show that the counter-claim was not maintainable. And once again nothing was said by the plaintiff before the Court on May 12, 1973 when all four actions were consolidated by Order of the Court, apparently because the claims of such actions involved a common question of law and fact, and as we know now, the four actions concerned proceeded at the trial as a single action.

We think it is necessary to state that both at the trial and in this appeal it has not been challenged by the plaintiff that the counter-claim set up by the defendant was related with the plaintiff's claim and that it arose out of the same traffic accident. But, counsel in arguing the appeal on this point, relying on the case of *Pilavachi and Co. Ltd.* v. *International Chemical Co. Ltd.* (1965) 1 C.L.R. 97, contended that the trial Court was wrong to give judgment on the counter-claim—though conceding that the Court confined itself to the issues appearing at the close of the pleadings—because at the time when such counter-claim was set up, no cause of action arose, and that a counter-claim, being in the nature of a cross-action, it could be set up after the judgment, but not before.

We have considered carefully this contention of counsel, but we find ourselves unable to agree that the trial Court was wrong because, once the issues of fact raised by the claims in the four actions and the counter-claim

were tried together, being consolidated, and both parties succeeded, the Court was bound to give two judgments, one for the plaintiff in his claim and the other for the defendant for his counter-claim, because in spite of the fact that a counter-claim is substantially a cross-action and not merely a defence to the plaintiff's claim, yet we think that the defendant was entitled to set up a counter-claim, once, as we said earlier, the counter-claim related and arose out of the same transaction. There is ample authority to the effect which clearly shows that a counter-claim need not relate to or be in any way connected with the plaintiff's claim or arise out of the same transaction. It need not be "an action of the same nature as the original action", (per Fry, J., in *Beddall* v. *Maitland*, 17 Ch. D. 174, at p. 181) or even analogous thereto.

In the case in hand there were four actions pending against the defendant and he had, in our view, a valid cause of action against the plaintiff for the reasons we have explained earlier and certainly, in our view, he was entitled to bring a counter-claim once he could have brought an action on the question of negligence, which was conveniently tried by the Court; and because every cross-claim of whatever kind can now be pleaded as a counter-claim.

A further question is whether the principle formulated in *Pilavachi's* case supports the opposite view claimed by counsel on behalf of the plaintiff. We have had the occasion to examine the facts and principles decided in that case, and with respect to counsel's contention we think that the principle extracted in that case, on the question of the counter-claim, has been misinterpreted and we propose quoting certain extracts from that case. According to the headnote at p. 98 :-

> "The respondents-plaintiffs, on the 11th November, 1963, obtained a judgment against the appellants-defendants in the High Court of Justice, Queen's Bench Division, in England, for £2,252.0.4d. plus interest and £26.16.6d. costs.
>
> The claim was based on (a) two bills of exchange for £2,229.13.1d. drawn by the plaintiffs-respondents and accepted by the defendants-appellants, both pay-

able in London, which were duly endorsed by the plaintiffs and presented in due course and were dishonoured; and (b) the defendants' failure to pay £14.7.9d., being the price of goods sold and delivered to the defendants, payment for such goods being due in London.

On the 2nd December, 1963, the respondents applied to the District Court of Limassol to have the said judgment registered under the provisions of section 4 of the Foreign Judgments (Reciprocal Enforcement) Law, Cap. 10, and leave to register such judgment was granted on the same day by the acting President, District Court, on terms.

On the 30th December, 1963, the appellants filed their application to set aside the registration of the judgment which is based on rule 10(1) of the Rules made under section 5 of Cap. 10, and on sections 4, 5 and 6 of the Law, Cap. 10, and Article 30.2 and 3 of the Constitution of the Republic.

In support of their application the appellants filed an affidavit in which they alleged that they were advised that they had a good claim based on the tort of conspiracy, against the respondents which they intended to assert against them and certain of their directors and others by means of a counterclaim, if the action had been brought in Cyprus, but that the plaintiffs purposely brought their action in the United Kingdom in order to put it out of the appellants' power to defend the action in England and make the defence there too expensive for them to meet the initial costs. They further alleged that in so far as the registration in Cyprus of the foreign judgment under Cap. 10 precludes the defendants from presenting their case before the Cyprus Court, the Law, Cap. 10 is unconstitutional as being contrary to Article 30 of the Constitution of the Republic.

The appellants contended, also, in their affidavit, that it would be against public policy, as understood in Cyprus, in the circumstances of this case not to set aside the registration of the aforesaid judgment.

The District Judge, who heard the application, dis-

missed it, on the ground that the provisions of the Foreign Judgments (Reciprocal Enforcement) Law, Cap. 10, were not repugnant to or inconsistent with the provisions of Article 30 of the Constitution."

An appeal was made against that decision, and was argued on three grounds, but we are mainly concerned with ground 2, which reads :-

"... it would be contrary to public policy and Article 30(2) and (3)(b) of the Constitution of Cyprus to deprive a citizen of his right to present his case before a Cyprus Court."

The Appeal Court held :-

"It is abundantly clear that the appellants do not have a right to present an independent action in Cyprus as the alleged tort of conspiracy was committed outside Cyprus, that no principles of public policy have been infringed, and that the appellants have not been denied a fair trial as they were not entitled to have their claim adjudicated upon in Cyprus. They had a reasonable opportunity of presenting their case to the English Court of which they failed to avail themselves and they cannot be heard now to complain that they are not given a second opportunity in a Cyprus Court. For these reasons we are of the view that there is no substance in this ground of appeal."

Josephides, J., who delivered the judgment of the Court of Appeal, after dealing with the contentions of counsel, posed these two questions :-

"(a) Is the respondent company answerable for Miller's alleged tort of conspiracy to break an agreement to which the respondent company was a party itself?

(b) If the respondent company had sued on the bills of exchange in the Cyprus Courts, could the appellants counterclaim for the alleged tort?"

As regards (a), the Court thought it was not necessary for the purpose of this case to decide the point in question, and with regard to (b) he said at p. 111 :-

"We think that there is ample authority that a defendant in an action 'has no business to put in a counterclaim except where an action could be brought' (per Jessel M.R. in *Birmingham Estates Company* v. *Smith,* 13 Ch. D. page 509). A counterclaim is substantially a cross-action; not merely a defence to the plaintiff's claim. It must be of such a nature that the Court would have jurisdiction to entertain it as a separate action (*Bow Maclachlan & Co.* v. *The Camosum* [1909] A.C. 597; *Williams* v. *Agius* [1914] A.C. 522). 'A counterclaim is to be treated, for all purposes for which justice requires it to be so treated, as an independent action' (per Bowen L.J. in *Amon* v. *Bobbett,* 22 Q.B.D. 548). In short, for all purposes, except those of execution, a claim and a counterclaim are two independent actions (per Lord Esher, M.R. in *Stumore* v. *Campbell & Co.* [1892] 1 Q.B. 317).

The above quoted English cases were decided on the interpretation of the English Rules of the Supreme Court, Order 19, rule 3 (prior to the 1962 Revision), which corresponds to our Order 19, rule 3.

It would seem that appellants' claim for conspiracy may lie, if at all, against Miller alone and not against the respondent company. But even if Miller were to be added as a co-defendant to the counterclaim proposed to be presented against the respondent company, then, under the provisions of Order 21, rule 8, which corresponds to the old English Order 21, rule 11 (new English Order 15, rule 3(1)), the counterclaim must ask for relief relating to or connected with the subject matter of the plaintiff's claim (see *Padwick* v. *Scott* 2 Ch. D. 736; and the Judicature Act, 1925, section 39(b)).

It is well settled that 'without strong ground a counterclaim ought not to be allowed in an action on a bill, cheque or note which is not disputed' (*Newman* v. *Lever* [1887] 4 T.L.R. 91), unless the counterclaim were so connected with the cause of action that it might be set up as a defence (per Thesiger L.J. in *Anglo-Italian Bank* v. *Wells (and Davies),* 38 L.T. 201). So that, even if a counterclaim could lie against the respondent company in a Cyprus Court,

based on the alleged conspiracy of Miller, it would be extremely doubtful, to say the least, if any strong ground could be found which would enable a Cyprus Court to allow such a counterclaim in an action of the respondent company on the bills of exchange due by the appellants, which were admitted, and on the basis of which the respondent company obtained their judgment in the English Court, which was eventually registered in Cyprus."

Later on, after summing up, he concluded at p. 112 :-

"In the circumstances of this case, it cannot be said that the appellants were unfairly prejudiced in the presentation of their case to the English Court, or that the English judgment offends against the principles of natural justice, and we are of the view that the enforcement of such judgment would not be contrary to public policy in Cyprus."

Thus it appears that this case is distinguishable from the facts of the present case, and in our view it does not even support the contention of counsel on the second point raised in the cross-appeal.

For the reasons we have endeavoured to explain, we would dismiss this contention of counsel also, and we affirm the judgment of the trial Court. We, therefore, dismiss both the appeal and cross-appeal, but with no order as to costs.

Appeal and cross-appeal dismissed.
No order as to costs.